STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2002
v	No. 233492 Oakland Circuit Court
GEORGE EDWARD PICKETT, Defendant-Appellant.	LC No. 00-174560-FH

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of larceny in a building, MCL 750.360. The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12, sentenced him to 1½ to 15 years' imprisonment. We affirm.

Defendant claims on appeal that the trial court erred in ruling that a prior retail fraud conviction (one of three prior retail fraud convictions) would be admissible for impeachment purposes under MRE 609 in the event defendant decided to testify. We disagree.

Defendant failed to preserve this issue for our review because he did not testify. *People v Finley*, 431 Mich 506, 521, 526; 431 NW2d 19 (1988). Therefore, our review is limited to a plain error analysis. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must show that the error was plain, i.e., clear or obvious, and that it likely affected the outcome of the proceedings. *Id.* Reversal is warranted only in cases of actual innocence of if the error seriously affected the fairness and integrity of the trial. *Id*.

Evidence of a prior conviction for impeachment purposes may be admissible either automatically, in the case of an offense involving dishonesty or a false statement, or after applying a balancing test in the case of an offense that involves theft and that is punishable by imprisonment for more than one year or death. MRE 609; see also *People v Parcha*, 227 Mich App 236, 243; 575 NW2d 316 (1997). MRE 609 states:

> (a) **General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

We note that certain kinds of retail fraud contain an element of dishonesty or false statement, while others are only considered theft crimes, depending on the conduct underlying the conviction. *Parcha, supra* at 246-247. If a defendant were to commit retail fraud by taking an item from a store, that prior offense would not fall under the realm of MRE 609(a)(1). *Parcha, supra* at 246. We assume for purposes of this appeal that the prior retail fraud offenses in question involved theft rather than dishonesty. According to MRE 609(a)(2)(B), evidence of these crimes should not have been admitted unless "the court further determines that the probative value of the evidence outweighs its prejudicial effect."

With regard to the balancing of probative value versus prejudicial effect, MRE 609(b) states:

> (b) **Determining Probative Value and Prejudicial Effect.** For purposes of the probative value determination required by subrule (a)(2)(B), the Court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the Court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The Court must articulate, on the record, the analysis of each factor.

For purposes of probative value, an objective analysis of "veracity and the vintage of the conviction" is all that is to be considered. *People v Allen*, 429 Mich 558, 606; 420 NW2d 499 (1988). Crimes involving an intent to commit theft are "moderately probative of veracity." See *id.* at 610-611. Additionally, defendant's prior retail fraud convictions, occurring in 1997, 1998, and 1999, are recent, and the "recentness of [a] crime accents . . . probative value." *Id.* at 611.

To determine prejudicial effect, the court can only look at the "similarity and increased importance of the [defendant's] testimony to the decisional process." *Id.* at 606. If the defendant's testimony is to be the only evidence introduced at trial for the defense, there will be a "high level of prejudice" if the impeachment would cause the defendant to refrain from testifying. See *id.* at 610. Moreover, if the charged offense is very similar to the prior conviction, it is considered highly prejudicial. See *id.* at 611. Larceny in a building and retail fraud, although somewhat similar, are two different crimes. However, they are similar enough that the admission of the retail fraud conviction would be prejudicial, and the trial court's ruling did indeed cause defendant to refrain from presenting testimony at trial.

The probativeness must outweigh the prejudicial effect for the prior conviction to be admissible. Here, the record shows that a proper balancing was done by the trial court. The court recognized that the recentness of the prior convictions made them significantly probative and further recognized and addressed the prejudicial effect by leaving out two of defendant's three prior retail fraud convictions. In coming to its final ruling, the court made the following statements:

> This case is a larceny in a building and although there are some similar elements . . . retail fraud involves taking merchandise. He [sic] we are dealing with, technically, credit cards. But the Court is mindful that there are some similarities and is mindful of the possible effects on the decisional process of admitting, which causes the Defendant to elect not to testify. In view of that, the Court will allow you to, if the Defendant chooses to take the stand, inquire as to one of the three retail frauds. I believe three is piling on, it's cumulative and it would work substantial prejudice. That is a final ruling. One retail fraud.
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> Well, in view of the fact that he has three, four felony convictions in the 90's, they all deal with theft, dishonesty, veracity and that's what's at issue here. The Court has limited it to two [sic] an uttering and publishing and one retail fraud, if the Defendant chooses to testify after considering the effect on Defendant's testifying here and what chilling effect it might have if the Court finds that those two can be admitted.

The trial court properly balanced the probative value versus the prejudicial effect, and we discern no clear or obvious error with regard to the trial court's ruling concerning the use of a prior retail fraud conviction for impeachment purposes.

As noted, the trial court also ruled that defendant's prior conviction for attempted uttering and publishing could be used for impeachment purposes. Although defendant does not challenge this ruling on appeal, we nonetheless note that no plain error occurred with regard to the ruling.

The crime of uttering and publishing consists of three elements: "'(1) knowledge on the part of the defendant that the instrument was false; (2) an intent to defraud; and (3) presentation of the forged instrument for payment.'" *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), quoting *People v Shively*, 230 Mich App 626, 631; 584 NW2d 740 (1998). The trial court did not clearly err in ruling that evidence of defendant's crime of attempted uttering and publishing crime would be admissible for impeachment, because the offense contains an element of dishonesty or false statement. Accordingly, it falls under the realm of MRE 609(a)(1) and is admissible. See *Allen, supra* 605.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter